

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 12, 2008 Session

JAMES M. WALKER v. JENNY C. (WALKER) STEVENS

**Appeal from the Chancery Court for Robertson County
No. 14672 Laurence McMillan, Chancellor**

No. M2007-02858-COA-R3-CV - Filed November 5, 2008

Father, primary residential parent of the two children of the parties, filed a petition for contempt against Mother alleging failure to pay child support and medical bills; Father also sought modification of the child support award. In response, Mother filed a counter-petition seeking to be named primary residential parent as to the daughter only, asserting that there had been a material change in circumstances justifying such relief. Following a hearing, the trial court ordered a recalculation of child support but otherwise denied the relief requested by both parties. Mother appeals the trial court's determination that she failed to prove a material change in circumstances and the court's exclusion of the court reporter during the testimony of Daughter. Finding no reversible error, the decision of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Chancery Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., and ANDY D. BENNETT, JJ., joined.

Imogene W. Bolin, Symrna, Tennessee, attorney for the Appellant, Jenny C. (Walker) Stevens.

Gregory D. Smith, Clarksville, Tennessee, attorney for the Appellee, James M. Walker.

OPINION

James M. Walker ("Father") and Jenny C. (Walker) Stevens ("Mother") were married in 1991. They had two children, Grant Michael Walker and Leslie Claire Walker ("Daughter"), before the parties were divorced on June 8, 2000. Mother and Father were awarded joint custody, with Father named as the primary residential parent and Mother granted visitation rights. Mother was ordered to pay child support to Father. On July 25, 2006, Father filed a petition for Civil Contempt for Failure to Pay Child Support and Medical Bills, and a petition to Modify Child Support. Mother filed a counter-petition to modify the parenting plan by naming Mother as the primary residential parent for the then 14 year old Daughter.

In support of her petition, Mother asserted the following changed circumstances: (1) that the relationship between Daughter and Father had deteriorated, with Father admitting that the two are not as close as they once were; (2) that Father did not have time to accommodate all Daughter's extracurricular activities; (3) that Daughter could not have friends visit her at Father's home, partly because Father referred to Daughter's friends in derogatory terms; (4) that Mother had a more stable financial situation; (5) that Father invaded Daughter's privacy and made disparaging remarks to Daughter about Mother; (6) and that Daughter had expressed a desire to live with Mother, a sentiment that had been conveyed to Mother, Father, and Daughter's guardian *ad litem* ("GAL").

In response, Father asserted (1) that the relationship with Daughter was strained due to her reaching adolescence; (2) that, when visiting Mother, Daughter had access to alcohol and that Daughter's acts of vandalism were condoned; (3) that Mother failed to seek psychiatric treatment for Daughter when Daughter considered cutting herself, while Father had taken such steps; and (4) that Mother's petition showed a willingness to separate Daughter from her brother, even though Mother believed that the children should reside together.

A hearing was held on the various petitions. In the course of the hearing, the court expressed a desire to hear from Daughter regarding her preference. Prior to interviewing Daughter, the chancellor ordered the courtroom cleared of all persons, including the court reporter, other than the parties, their counsel and the GAL.

The court thereafter entered an Order requiring a recalculation of child support;¹ in all other respects, the relief requested in both petitions was denied. Mother subsequently filed a Motion to Alter or Amend the Judgment and/or a Motion for New Trial; the Motion to Alter was denied, and the Motion for a New Trial was withdrawn.

Mother raises two issues on appeal: (1) whether the chancery court erred in finding no material change in circumstances to warrant a modification of the child custody order, and (2) whether the chancery court erred in removing the court reporter when questioning Daughter. Upon review of the record, we find the chancery court's findings of no material change to be proper, and that the removal of the court reporter from the courtroom during Daughter's testimony was not in error.

STANDARD OF REVIEW

We reviewed the trial court's conclusions of law under a *de novo* standard, with no deference to the conclusions made by the lower court. *Kendrick v. Shoemaker*, 90 S.W.3d 566, 569-70 (Tenn. 2002); *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001). A "review of findings of fact by the trial court in civil actions shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d); *Kendrick*, 90 S.W.3d at 570.

¹ No issue relating to the recalculation of child support is presented in this appeal.

In applying the *de novo* standard, “we are mindful that ‘[t]rial courts are vested with wide discretion in matters of child custody’ and that ‘the appellate courts will not interfere except upon a showing of erroneous exercise of that discretion.’” *Johnson v. Johnson*, 169 S.W.3d 640, 645 (Tenn. Ct. App. 2004) (quoting *Koch v. Koch*, 874 S.W.2d 571, 575 (Tenn. Ct. App. 1993)). “Because ‘[c]ustody and visitation determinations often hinge on subtle factors, including the parents’ demeanor and credibility during...proceedings themselves,’ appellate courts ‘are reluctant to second-guess a trial court’s decisions.’” *Johnson*, 169 S.W.3d at 645 (quoting *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1993)).

ANALYSIS

I. Material Change in Circumstances

Mother asserts that the chancery court erred in finding that no material changes existed to support the modification of the child custody order. This conclusion was based on findings of fact made by the trial court, so our review of the decision is *de novo* with a presumption of correctness afforded to the lower court.

A. Standard for Modifying a Custody Order

Because children are more likely to thrive in a stable environment, the courts favor maintaining existing custody arrangements. *Taylor v. Taylor*, 849 S.W.2d 319, 332 (Tenn. 1993); *Kellett v. Stuart*, 206 S.W.3d 8, 14 (Tenn. Ct. App. 2006); *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). A valid custody order or residential placement schedule, once entered by the court, is *res judicata* as to the facts in existence or reasonably foreseeable when the decision was made. *Keisling v. Keisling*, 196 S.W.3d 703, 719 (Tenn. Ct. App. 2005); *Hoalcraft*, 19 S.W.3d at 828.

Nonetheless, a custody and visitation order, or the residential schedule in a permanent parenting plan, may be modified in certain situations. Such an order remains within the control of the court and is subject to “such changes or modification as the exigencies of the case may require.” Tenn. Code Ann. § 36-6-101(a)(1). Both the legislature and the courts have addressed the requirements for such a modification, in recognition of the fact that the circumstances of children and their parents change, sometimes requiring changes in the existing parenting arrangement. When a petition to change custody is filed, the parent seeking the change has the burden of showing that a material change in circumstances has occurred which makes a change in custody in the child’s best interest. *Blair v. Badenhop*, 77 S.W.3d 137, 148 (Tenn. 2002); *In re M.J.H.*, 196 S.W.3d 731, 744 (Tenn. Ct. App. 2005); *In re Bridges*, 63 S.W.3d 346, 348 (Tenn. Ct. App. 2001).

A decision on a request for modification of a parenting arrangement requires a two-step analysis. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003). A party petitioning to change an existing custody order must prove both (1) that a material change of circumstances has occurred and (2) that a change of custody or residential schedule is in the child’s best interest. *Kendrick*, 90

S.W.3d at 575. Only after a threshold finding that a material change of circumstances has occurred is the court permitted to go on to make a fresh determination of the best interest of the child. *Kendrick*, 90 S.W.3d at 569; *Badenhope*, 77 S.W.3d at 150; *Curtis v. Hill*, 215 S.W.3d 836, 840 (Tenn. Ct. App. 2006).

As to the first requirement, *i.e.*, a material change of circumstances, the Tennessee Supreme Court has stated:

Although there are no bright line rules as to whether a material change in circumstances has occurred after the initial custody determination, there are several relevant considerations: (1) whether a change has occurred after the entry of the order sought to be modified; (2) whether a change was not known or reasonably anticipated when the order was entered; and (3) whether a change is one that affects the child's well-being in a meaningful way.

Cranston, 106 S.W.3d at 644 (citing *Kendrick*, 90 S.W.3d at 570).

The General Assembly has also addressed the question of what constitutes a material change of circumstances:

(B) If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

(i) In each contested case, the court shall make such a finding as to the reason and the facts that constitute the basis for the custody determination.

Tenn. Code Ann. § 36-6-101(a)(2)(B).

Only if a material change of circumstances is shown to exist is the trial court to proceed to the next step of the analysis: whether modification of the existing parenting arrangement is in the child's best interest. *Cranston*, 106 S.W.3d at 644; *Kendrick*, 90 S.W.3d at 569; *Curtis*, 215 S.W.3d at 840. That determination requires consideration of a number of factors, including those set out in Tenn. Code Ann. § 36-6-106(a) (factors to consider in custody determination) and Tenn. Code Ann. § 36-6-404(b) (factors to consider in establishing a residential schedule).

B. Application of the Standard

The first step of our analysis requires a review of the alleged changed circumstances to determine if they are material and unforeseen. The chancery court made few findings of fact upon which it based its decision.² Thus, we must review the record to determine if Mother's allegations of changed circumstances meet the required threshold.

Father and Daughter's Strained Relationship

Mother first asserts that a material change in circumstances exists because the relationship between Father and Daughter had strained, leading to Daughter's desire to live with Mother. Father testified at trial that he and his daughter were "not as close as [they] were," but he claimed that "[p]art of it is adolescence, and just her attitude at times and defiance." Father stated that he noticed the change when "[Daughter] started wanting to go live with her mother." Mother testified that Daughter's desire to live with Mother first started when she was "upset over something or something didn't go [her] way. But as time has progressed, [Daughter's] relationship with [Father] ha[d] deteriorated somewhat." Mother stated that the relationship might improve if Daughter changed residences.

Mother's only proof to support a change in circumstances is that the relationship between Father and Daughter has strained over time. Mother has presented no evidence to suggest that this strain was out of the ordinary or harmful to the child. As such, this situation does not amount to a material, unforeseen change in the circumstances.

Father's Lack of Time

Mother next asserts that Father does not have enough time to accommodate all of Daughter's extracurricular activities, forcing her to choose some activities over others, and that this is a material change in the circumstances that requires a modification. Father testified that he had asked Daughter to choose between recreational softball and travel softball, and that the decision to play recreational ball was made "because [the travel team was] gone every weekend, or almost every weekend." Father stated that the "travel ball commitments would have been too much for the family." Mother testified that the children are involved in cheerleading, basketball, baseball, and softball, and that she travels to attend the games.

The standard set by the statute is that the alleged change in circumstance be of such magnitude that the original parenting plan is no longer in the best interest of the child. It is clear that Daughter is involved in many activities and, as testified by Father, accommodating all activities

² The chancery court's order stated that "Mother failed to carry her burden of proof to show there had been a material change of circumstances, not foreseeable to the parties upon entry of the original custody decree. The Court would note that this case did present a close question, but that there was no proof to show that material change of circumstances."

would place a strain on family resources. There is no proof that travel softball was anything other than a preference or desire of Daughter, or that her inability to participate in it (or in any other extracurricular activity) was in any way detrimental to her.

Father's Attitude Towards Mother and Daughter's Friends

Mother next argues that a material change exists because Father has made statements which were derogatory towards Mother and Daughter's friends, causing resentment towards Mother and preventing Daughter from inviting friends to Father's house. Father testified that he referred to Daughter's friend as a "bitch." The mother of Daughter's friend testified that the friend will not visit Daughter at Father's home, but will travel to Mother's home once a month for the entire weekend. Witnesses at trial, on Mother's behalf, testified that Father, in front of the children, referred to Mother as "Cruella" and told Daughter that she was "being stupid like her mother." Mother testified that none of Father's comments were made in her presence, but she only heard of them from the children and people in the community.

Father's derogatory comments are inappropriate and do not set a good example for his children; they certainly do not serve to ease the strain between he and Daughter. Daughter's continued desire to live with Mother, however, shows that Father's remarks did not cause a negative change in Daughter's relationship with Mother. Furthermore, Daughter's unwillingness to bring friends to Father's house does not alter her ability to spend time with friends at school, during school activities, and at Mother's home. While Father's behavior is inappropriate, it has not created a situation where the circumstances were materially changed.

Father's Financial Situation

Mother's last argument is that Father's poor financial situation is a material change in circumstances which would warrant a modification of the parenting plan. Mother asserted that her financial state was much more secure than Father's, and that she would be better able to provide for Daughter. Mother's evidence in support of Father's unstable financial situation included (1) Father's 2006 tax return which shows that he made \$1,600, (2) Father's testimony that he earned \$5,957 in 2005, and (3) Father's current wife's testimony that her business lost \$30,000 in 2005 and \$60,000 in 2006. Mother stated that she has a steady job with a steady, reliable income, but provided no evidence as to the actual amount.

The trial court's order regarding the financial situation of each party stated as follows:

5. ...[it] was not impressed by the Father's claim that he makes \$1,600 per year when he is able to make a \$1,400 per month mortgage/rent payment on his home. The Father's income shall be imputed in the amount of \$35,851.00 per year.

6. ...the Mother failed to present proof regarding her income and her income shall also be imputed to be \$26,450.00 per year.

The trial court held that Mother failed to produce sufficient evidence to support her allegation that her financial situation was more secure than Father's and that she was better able to provide for Daughter. Having reviewed the record, and affording the trial court's findings a presumption of correctness, we see insufficient evidence in the record to contradict the trial court's findings in this regard.

Accordingly, we find that Mother has not met her burden in proving that a material, unforeseen change in circumstances has resulted since the original custody decree was adopted.

II. Exclusion of the Court Reporter

The other issue presented by Mother is whether the trial court erred in removing the court reporter from the courtroom during Daughter's testimony. Father argues that Mother waived this issue at trial, or in the alternative, if the issue was not waived, that any error that resulted was harmless.

A. Waiver of the Issue on Appeal

Father first asserts that, when Mother withdrew her Motion for New Trial, any issue raised in the motion was waived on appeal because she affirmatively withdrew from the court's consideration issues she initially asserted. One of the issues raised in the Motion for New Trial was the removal of the court reporter, and Father asks this Court to consider the issue waived. We find that Mother's withdrawal of her Motion for New Trial did not waive her right to appeal the issues contained therein.

Tenn. R. App. P. 3(e) requires the filing of a Motion for New Trial before an appeal from a jury trial can be made to a higher court. Tenn. R. App. P. 3(e); *McCormic v. Smith*, 659 S.W.2d 804, 805 (Tenn. 1983). This rule states that:

...in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

Tenn. R. App. P. 3(e). The Tennessee Supreme Court in *McCormic v. Smith*, 659 S.W.2d 804 (Tenn. 1983) reaffirmed that Tenn. R. App. P. 3(e) applies only to cases tried by a jury. *McCormic*, 659 S.W.2d at 806. The Court further stated that precedent "does not...stand for the proposition that all errors of the trial judge...must be brought back for further consideration by the trial court on a motion under Rule 59, T.R.C.P. before such issues can be considered on appeal." *Id.*

The present case was tried before a chancellor, without the presence of a jury. Based on Tenn. R. App. P. 3(e), Mother was not required to file a motion for new trial as a prerequisite to appeal, and the subsequent withdrawal of the motion is not a waiver of the issues contained therein.

Father argues in the alternative that because Mother did not object to the removal of the court reporter at trial, she cannot raise the issue on appeal. Prior to trial, Mother moved to hear the preference of a minor child, to which Father had no objection.³ Both parties agreed that the GAL would conduct Daughter's direct examination, however, the court chose to conduct the questioning itself. Prior to the interview, the GAL stated that "if [the court is] going to call the child, unless we're going to do it in chambers, I would ask for the courtroom to be cleared out." No objection to this request was made by either party.

In *Rutherford v. Rutherford*, 971 S.W.2d 955 (Tenn. Ct. App. 1997), this Court dealt with a situation similar to the present case where no objection was made when the trial judge questioned a minor child outside the presence of a court reporter. *Rutherford v. Rutherford*, 971 S.W.2d 955, 957 (Tenn. Ct. App. 1997). This Court stated that "[w]hile we agree that counsel should have objected, failure to object does not insulate the Trial Court from committing reversible error..." *Id.*

In accordance with our ruling in *Rutherford*, we find that Mother's failure to object will not prevent our consideration of this issue.

B. Removal of the Court Reporter

"A trial judge has discretion to interview children *apart from the courtroom setting* if he considers it is in the best interest of the child." *Rutherford*, 971 S.W.2d at 956 (emphasis added). If the trial court "elects to follow this procedure, he must examine the child 'in the presence of attorneys for each side and in the presence of the court reporter.'" *Id.* at 956-57 (citing *Newburger v. Newburger*, 10 Tenn.App. 555, 556 (1930)). Without a transcript of the minor's testimony, the record on appeal will be incomplete. *Rutherford*, 971 S.W.2d at 957.

In *Rutherford*, this Court reversed a trial court order changing custody of a child because the child was interviewed in the judge's chambers outside of the presence of the parties or counsel and without having a court reporter present. *Id.* at 956. The reversal was based on this Court's need to review the transcript of the court's interview with the child because of the requirement that we accord the trial court's determination a presumption of correctness, *see* Rule 13 (d), Tenn. R. App. P. *Id.* Without the transcript, this Court was unable to afford such a presumption because the interview's purpose and whether it was a factor in the lower court's decision was unknown. *Id.*

The present case is distinguishable from *Rutherford* because here Daughter was questioned in the courtroom in the presence of the parties and their counsel. The parties' presence in the courtroom enabled them to witness Daughter's testimony, which was to allow her to express her

³ The court has the authority to consider such testimony under Tenn. Code Ann. § 36-6-106 (7)(A).

preference to live with Mother. Mother and Father had each separately testified and the GAL reported that Daughter's preference was to live with Mother. Unlike *Rutherford*, the absence of the transcript of Daughter's testimony does not prevent us from performing our responsibilities, including according a presumption of correctness to the chancery court's decision. The purpose as well as the substance of the child's testimony is known and undisputed.⁴ The court was entitled to consider Daughter's preference as a factor in its conclusions pursuant to Tenn. Code Ann. § 36-6-106(7)(A) and no complaint is made that the court improperly considered Daughter's preference.

Mother asserts that Daughter's testimony contained more than just her custody preference and it had a bearing on the question of whether there was a material change in circumstances; she contends that the absence of the transcript deprives this Court from viewing Daughter's preference in its intended context. Mother does not complain that evidence was excluded by the trial court, but rather, that, because the court reporter was not present, the testimony was not preserved for the record.

Mother's assertion in this regard goes to the lack of a transcript of Daughter's testimony rather than to alleged error in excluding the court reporter. For purposes of appeal Mother is permitted to file a statement of the evidence in accordance with Tenn. R. App. P. 24(c).⁵ No such statement has been filed. Without it, we are unable to consider the evidence from Daughter's testimony Mother considers to be pertinent to our review of the trial court's decision.

CONCLUSION

For the reasons set forth above, the decision of the Chancery Court is AFFIRMED. Costs are assessed against Ms. (Walker) Stevens for which execution may issue if necessary.

RICHARD H. DINKINS, JUDGE

⁴ The parties agree that the purpose of this testimony was to allow the court to consider Daughter's preference as to custody, and agree that she testified that her preference was to live with Mother.

⁵ Tenn. R. App. P. 24 (c) states:

If no...transcript of the evidence or proceedings is available, the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement should convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal.